IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 153

DANIEL MCMANN, Warden of Clinton Prison, Dannemora, New York and HAROLD W. FOLLETTE, Warden of Green Haven Prison, Stormville, New York,

Petitioners,

against

WILLIE RICHARDSON, FOSTER DASH and MCKINLEY WILLIAMS,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

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249 Press of Fremont Payne, Inc., 80 Washington St., N. Y.—BOwling Green 9-8153

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ARGUMENT

The standards suggested by respondents for measuring the adequacy of a petition for habeas corpus by a state prisoner who has pleaded guilty are consonant neither with the decisions of this Court nor with the demands of justice or common sense.

1. None of the guilty pleas in these cases is "based on" a coerced confession.

Respondents have abandoned the Second Circuit and have struck out on their own. In doing so, however, they have not suggested to this Court any more viable stand-

ards by which to measure the allegations in their petitions than did the majority below. Respondents pay lip service to the Second Circuit decision by contending first that if a guilty plea is "based on" (Br., pp. 18, 25) or "predicated upon" (Br., p. 22) a coerced confession or is "brought about" (Br., p. 23) by the confession or if the confession is "the motivation for" (Br., p. 20) or "used to secure" (Br., p. 16) the plea, the conviction is void. This presumably is the substantial motivation test announced by the Second Circuit.

These conclusory standards find no support in the facts of these cases. In none of these cases is there even an allegation that any of the prosecutors or courts involved in these convictions had any idea that a confession was coerced or false. Respondents never confronted the State with a claim of coerced confession contemporaneously with conviction. There is no allegation that any state officer either directly or indirectly threatened any of these respondents with the introduction of a confession, let alone with the introduction of a coerced confession, if they refused to plead guilty. In short, the State in no way used the alleged confessions as leverage to induce these guilty pleas to reduced charges.

In the absence of any such allegations, respondents' claim comes down to the fact that the existence of confessions which they claimed to be coerced automatically entitles them to their release. Yet, if these respondents had gone to trial and moved to suppress the confessions and those confessions had been suppressed, the Court of Appeals would not have been misled into vitiating the convictions since the confessions were not introduced in evidence. Similarly here, if coerced confessions existed, they were not introduced against the respondents and any claim regarding such confessions is irrelevant to an attack upon their convictions. This Court has refused to hold that a prior illegal act of a state completely bars prosecution. *United States* v. *Blue,* 384 U. S. 251 (1966).

The cases relied on by respondents do not support their invocation of the "based on" or "threatened use" standard in the absence of specific factual allegations. We have in our main brief (pp. 26, 28-29) discussed *Pennsylvania ex rel. Herman* v. *Claudy*, 350 U. S. 116 (1956) and *Waley* v. *Johnston*, 316 U. S. 101 (1942). *Waley*, of course, did not involve a confession claim and in *Herman* the facts clearly established that coercion ran from the confession to the plea.

Nor is *Chambers* v. *Florida*, 309 U. S. 227 (1940), of any assistance to respondents. In that case even the defendants who pleaded guilty had their confessions used against them. Florida has a separate sentencing proceeding even for defendants who plead guilty and the confessions were affirmatively used by the State at that proceeding (*Chambers* v. *State*, 152 So. 437 [1934]). The State consistently conceded that the confessions were used to obtain all the convictions. Moreover, the evidence in that case with respect to pervasive and continuing official involvement in the coercion of the confessions made that case very similar to *United States ex rel. Perpiglia* v. *Rundle*, 221 F. Supp. 1003 (E. D. Pa. 1963) (Petitioners' main brief, pp. 28-30).

By footnote and appendix respondents have placed before this Court a number of other cases which they claim uphold the vague standard for which they argue. Thus, in footnote 29 on page 32 of their brief, respondents cite *Zachery* v. *Hale*, 286 F. Supp. 237 (D. C. Ala. 1968); *United States ex rel. Cuevas* v. *Rundle*, 258 F. Supp. 647 (E. D. Pa. 1966) and *Smiley* v. *Wilson*, 378 F. 2d 144 (9th Cir. 1967).

Zachery, is a perfect example of a *Herman* v. *Claudy*, type of case. Zachery was a 16-year-old illiterate youth charged with murder in the first degree, who 11 days later entered a guilty plea having been denied a change of venue, a continuance and a sanity hearing. The state

stipulated that he had been held incommunicado during this time and his attorney properly despaired of saving the boy's life in the face of such disabilities. Obviously, the factors which illegally induced the confession in that case had not been removed at the time of plea and to a great extent were the same as those that motivated the plea. Obviously too, the trial court's complete refusal to grant relief to which the defendant was clearly entitled effectively precluded him from going to trial. *United States ex rel. Perpiglia* v. *Rundle, supra.*

By contrast *Smiley* v. *Wilson, supra* is not substantially different from the opinion below and is equally incorrect. (See Dissent of Judge Byrne, *id,* at 149-152.) There the petition for habeas corpus attacked three judgments of conviction for which petitioner was serving sentences in state prison. He had gone to trial in two of the instances. In an undifferentiated application for relief, he alleged in all three cases that all the confessions were involuntary. The warden replied that petitioner had not raised the issue of involuntariness in the two cases in which he had gone to trial and that the involuntariness of his plea in the third case precluded his raising the issue in that case. The Court disagreed (*id.* at 147):

> "It may be that this is an accurate statement with regard to the other two applications, each involving a trial after a plea of not guilty. However, it is not responsive to the coerced plea issue in Case No. 156591, now under discussion, because in that case Smiley pled guilty and there was no trial at which a confession could have been introduced in evidence."

This holding that there must be a hearing on the voluntariness of the confession not introduced against *Smiley,* while those used against him were immune from attack, is not supported by any discernible rationale. Thus, the only distinction between that case and this is that the Ninth Circuit treated the case as one based on the specific

facts of this case whereas the Second Circuit issued a ruling *in banc* which was intended to cover all future claims of invalid guilty pleas. And respondents' claim that other circuits "have lived with the 'floodgates [sic]'" (Resp. Br., p. 49) that were opened by the Second Circuit is not accurate. No other circuit has elevated a holding in a specific case to a general rule. The general language which is found in some of respondents' citations which supports their theory frequently belies the facts in those cases where the plea itself is directly challenged. See, e.g., *Parker* v. *State,* 2 N. C. App. 27, 162 S. E. 2d 526 (1968), *cert. granted* 395 U. S. 974 (1969), O. T. 1969, No. 268; *Williams* v. *Wainwright,* 415 F. 2d 1136 (5th Cir. 1969); *Bright* v. *Rhay,* 391 F. 2d 915 (9th Cir. 1968); *Zachery* v. *Hale, supra; United States ex rel. Perpiglia* v. *Rundle, supra.* Compare *e.g., Smiley* v. *Wilson, supra.* By contrast the cases cited by petitioners which reject respondents' theory in those (Main br., p. 25) and other circuits (Main br., pp. 26-27, 32) are pointedly ignored. Suffice it to say that the cases cited where relief is granted because of continuing coercion would have been decided that way before the Second Circuit decision, and that the reasoning in those cases which granted ultimate relief without allegations of continuing coercion, is strained and untenable.

The majority opinion does not deny the magnitude of its impact and the concurrence by Judge Kaufman was directed at limiting that impact. It is Judge Kaufman's interpretation of the rule announced by the majority that it only applies to pleas of guilty made before this Court's decision in *Jackson* v. *Denno,* 378 U. S. 368 (1964). Of course, this interpretation is rejected by respondents (Resp. br., p. 45). The three independent dissents demonstrate conclusively that the impact of the majority rule will be enormous and common sense supports their presentations.

United States ex rel. Cuevas v. *Rundle, supra,* concerning a youth who pleaded guilty to murder generally and then was subject to Pennsylvania's unusual procedure of a separate trial proceeding to determine the degree of guilt, also involves a situation in which, as in *Chambers,* a confession was used by the State. The writ was issued in *Cuevas* because, under the facts of that case, the defendant had not been informed, apparently by the court, of his right to test the voluntariness of his confession. Respondents appear to say elsewhere that this warning is constitutionally required even where the confession is not introduced (Br., p. 29, footnote 27).

Nonetheless, respondents artfully avoid suggesting that the judicial procedure for accepting pleas must be altered so that this warning is given. In so doing, respondents avoid having to face the omission of this warning from Federal Rule of Criminal Procedure 11 and this Court's analysis in *Boykin* v. *Alabama,* 395 U. S. 238 (1969) and *McCarthy* v. *United States,* 394 U. S. 459 (1969). (See petitioners' main br., pp. 50-52.) Astoundingly, claiming that their pleas were illegally obtained by the State, the proceeding at which they were obtained is not discussed at all. Rather, respondents claim at one point that the colloquies at plea and sentence are not reliable" (Resp. Br., p. 26) and, at another, complain that the district judge in *Williams* did not have those records before him (Resp. Br., p. 12).* It would appear (A. 38, 72), that all three district judges did examine those records before dismissing the writs although these minutes were not before the court below. It is not petitioners' position that this examination constituted a hearing. In the face of a

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* Respondents also note that there was no opposition filed in the District Court in *Richardson.* It is the practice in the Northern District for the Court to preliminarily examine petitions for habeas corpus and to dismiss those which can be disposed of on their faces without requiring opposition.

claim of a coerced guilty plea those are the essential records. It is respondents who minimize, when they do not ignore, the conviction procedures.

2. Respondents have failed to establish any connection between their allegedly coerced confessions and their allegedly involuntary guilty pleas.

Respondents apparently realize the weakness of the "based on" concept standing alone, since abandoning the Second Circuit they have abruptly switched to a so-called "nexus" theory (Resp. Br., p. 24 and Point II). This is an attempt to accommodate their position with the decisions of this Court that there must be a connection between the alleged coercion of a confession and the alleged coercion of the guilty plea and that that connection must be a factual one of continuing coercive elements. Respondents agree that there must be a connection, or what they denominate as a nexus, but what they see in each of these cases as a nexus is in fact a wholly independent factor totally unrelated to the alleged illegality which supposedly coerced the confessions.

These factors, are in the *Richardson* case, the alleged incompetence of counsel and in the *Dash* and *Williams* cases, the existence at the time of the pleas of guilty of the pre-*Jackson* v. *Denno,* 278 U. S. 368 (1964), procedure in New York for testing the voluntariness of confessions. The nexus in each of these cases is apparently a substitute for substantial motivation which respondents would not like to have to establish but which can not fairly be read out of the decision below. With both of these nexus claims different as they are, there are common faults. First, as we have stated, neither bears any relation to why the confession is involutary, if it is. Thus, any inquiry into the voluntariness of the confession would be irrelevant. Second, each requires the establishment of an inference upon an inference upon an inference. Thus, an

alleged confession allegedly coerced could not be tested by an allegedly incompetent counsel or an allegedly unreliable procedure. Contrast *Fay* v. *Noia*, 372 U. S. 391 (1963), so heavily relied on by respondents, in which, however a concededly coerced confession was in fact used against Noia who contemporaneously objected to its use, demonstrating the coercion at trial.

The gravamen of respondents' argument is that a nexus is created in the absence of allegations by means of a presumption of incompetence of counsel (Resp. br., pp. 24-25, 45). Thus in the absence of an affirmative statement in a petition for habeas corpus relief that counsel was competent (Resp. br., p. 45), petitioner may attack an allegedly coerced confession notwithstanding the fact that it was not used against him. Respondents contend that only when a petitioner states that his counsel was competent is the "clear danger" (Resp. br., p. 15) of a pre-*Jackson* trial relevant. Thus the nexus is no factor at all and every plea of guilty is subject to evidentiary attack. Either counsel was incompetent and ignored the hazard of a pre-*Jackson* trial or if, by chance, competent, wisely advised that trial was not a viable alternative. In either event a hearing must be held.

As if the mere stating of the theory were not enough, respondents' factual support for their nexus argument further demonstrates how unfounded the argument is. Thus, in *Richardson* the claimed nexus is the alleged incompetence of counsel. Counsel is said to have been inadequate because he saw Richardson only briefly, and because he misadvised him by telling him that he could raise the voluntariness of his confession at a time subsequent to the plea. Counsel to Richardson in the trial court was an experienced practitioner in criminal law. He is a reputable member of the New York Bar. His affidavit before the Court below indicated that he had consulted with respondent and his co-counsel, that they had investi-

gated the case and that they had secured a plea to a lesser charge (A. 105-107). Richardson on the other hand has shown himself in his other affidavits to be untrustworthy (Petrs. Main br., 9-10, 38-39), and his affidavits on their face are patently incredible. When Richardson pleaded guilty, a careful exploration of the truth and the voluntariness of the plea was undertaken by the trial court. Yet, the majority below relied on allegations submitted for the first time five years after the events to, in effect, establish a presumption against the competency of counsel and the validity of the conviction. Thus, a situation has been created where any application, no matter how fanciful, is sufficient to haul counsel before a collateral inquiry and have him establish his competence in each case he undertook.

In this Court, respondents suggest for the first time that counsel was so incompetent that the "option of going to trial . . . is not a legitimate one" (Respondents' br., p. 28). Even Richardson's allegations of incompetence relate to legal advice rather than to ability to conduct a trial. The suggestion that counsel is the only neutral agent between the confession and the plea ignores both the crucial role of the judge who accepted the plea and the fact that time itself is a sufficient factor. The claim on behalf of Richardson that any course other than a guilty plea might have offended the judge is shocking since this "specific" allegation is admittedly a quotation from *United States ex rel. Perpiglia* v. *Rundle, supra* and not made by Richardson at all. It in fact refers to a motion to withdraw a plea before a judge who seemingly was not neutral.

The second nexus found by respondents is the existence of the pre-*Jackson* v. *Denno* procedure in New York for testing the voluntariness of confessions. The first and most egregious error made with respect to this claim on behalf of *Dash* and *Williams* is found in the Questions Presented (Respondents' br., pp. 2-3) with respect to both

respondents. It is suggested that counsel advised each of them that the means of testing a confession was "inherently unreliable". There has never been an allegation that either counsel so advised either respondent. There has never been an allegation that either respondent was even aware of the difficulties posed by the pre-*Jackson* procedure. There has never been an allegation that either respondent pleaded guilty because of the pre-*Jackson* procedure. Each respondent merely alleged that after *Jackson* v. *Denno* it was clear that if he had gone to trial, the trial would not have been a fair one (A. 29, 54-55). In short, each uses hindsight to create a dilemma for himself which he does not allege existed at the time.

The claim that counsel was unable to "do anything meaningful to prevent the confession from being used" (Respondents' br., p. 34) is erroneous. Although we have stated in our main brief that a hearing on voluntariness must necessarily have been in the presence of a jury (Br., p. 43), that statement was, as respondents have accused us in a different context, "overgenerous" (Respondents' br., p. 29, footnote 27). For example, a special verdict could have been requested (New York Code of Criminal Procedure, §§ 436 and 438). Moreover, the trial judges in New York State obviously did not regard the rule as mandatory. A [redacted] trial transcript [redacted] has come to our attention for reasons unrelated to this case [redacted] which demonstrates that it was the practice in many cases to hold a *voir dire* on a confession would be held out of the presence of the jury.* Respondents' argument on the meaning of *Jackson* v. *Denno* is otherwise answered in our main brief, Point II.

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* *People* v. *Jose Crespo, et al.*, New York County, sentenced (after a guilty plea following two weeks of trial) on May 26, 1960. In *Crespo*, the following took place:

"The Court: My only concern at this point is whether or not the statement obtained from either defendant was obtained as a result of force or fear induced by threats to such an extent that it must as a matter of law be excluded from the jury. There are two ways as I understand it that we may proceed at this time:

(*footnote continued on following page*)

The fact that the *Stein* rule may have been inadequate after a case actually went to trial, is not shown by respondents to have been so dangerous that it inevitably coerced their guilty pleas. There is absolutely no evidence that the *Stein* procedure once sanctioned by this Court and overruled in the face of sharp dissent, has ever coerced a single guilty plea.

3. Hearings are unnecessary to adjudicate the incredible claims either of coerced confessions or of the supposedly independent contentions of respondents.

The instant self-serving allegations of coerced confessions, incompetent advice of counsel, threats by a judge, and misunderstanding of the status of robbery in the

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(*footnote continued from previous page*)

> You may apply for an opportunity to examine the detective, and this testimony can be taken in the absence of the jury. If an issue of fact—if it is established as a matter of law that the statement should be exluded [sic], I will rule accordingly.
>
> On the other hand, if the factual issue is raised which requires that you submit the issue of the voluntariness of the statement to the jury, then of course the questions and answers must be repeated in the presence of the jury." (546-547)

Counsel asked for a *voir dire* in the absence of the jury and it was granted for such time as it became relevant, that is when the statements were about to be used (548). At that time, the following occurred:

> "The Court: If it is the intention of the defense to attack the voluntariness of the statement/or confession, I will charge the jury appropriately with respect to that law. If the evidence establishes that it should be excluded as a matter of law, you may then make the appropriate application.
>
> Mr. Levine: I was under the impression that usually this is done in advance before the jury hears it if we object to the voluntariness.
>
> (At this point there was an off-the-record discussion at the bench, out of the jury's hearing, after which the proceedings were resumed in open court, as follows):
>
> Mr. Levine: In the light of the conference at the bench, that objection is withdrawn." (579)

Crespo is presently seeking habeas corpus in reliance on the decision below. *United States ex rel. Crespo* v. *LaVallee* (S.D.N.Y.), 69 Civ. 5195.

realm of crimes are inherently incredible. No reasonable person believes that there is any possibility that any Court will hold that these respondents were coerced into confessing. It is certainly beyond the pale of possibility that their claims, independent of coercion, are sufficient to warrant release from custody. Yet if the decision below stands virtually every person who crossed paths with these petitioners between the time they were arrested and the time they were sentenced will be called to Court to answer these frivolous charges. No conceptual theory demands so much. By way of the flexible writ of habeas corpus, such exercises in futility may be avoided without ignoring the pleas of those unjustly imprisoned.

CONCLUSION

The decisions below should be reversed and the cases remanded with instructions to dismiss the petitions.

Dated: New York, New York, January 15, 1970

Respectfully submitted,

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